IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

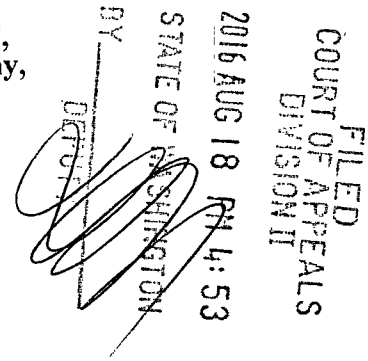
NO. 48432-3-II

RIVERSTONE HOLDINGS NW, LLC,
a Washington Limited Liability Company,
Respondents,

vs.

ALICE LOPEZ, an unmarried woman,

Appellant/Defendant.



ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF CLARK

APPELLANT LOPEZ'S OPENING BRIEF

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A. Assignments of Error

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B. Issues Pertaining to Assignments of Error

1. Whether an Article II, Section 1 Issue is raised by the Conflict Between *Brown* and RCW 62A.9A-203.

2. Whether Factual Issues existed warranting Jury Trial under RCW 59.18.130 and RCW 59.18.380.

3. Whether Defendant was permitted to assert Invalidity of the Assignment.

II STATEMENT OF THE CASE

A. Relevant Facts

On or about November 29, 2004, Plaintiff executed a promissory note ("Note") and deed of trust ("DOT"). *CP,* at 7. The DOT listed Fidelity National Title as Trustee, and Washington Mutual Bank, a Washington corporation ("WMB"), as the beneficiary and the Lender. *Id.* The DOT granted WMB a security interest in Plaintiff's residence located at 14030 SE 35th Loop, Vancouver, WA 98683 (Hereinafter "Property"). *Id.* The DOT was recorded in the Clark County Auditor's Office under Recording Number 3917334 on December 7, 2004. *Id.* The DOT provided WMB with a lien interest ***in*** the Property. *Id.*

RCW 64.04.010 requires all transfers of interests ***in*** real property to be conveyed by deed.

RCW 64.04.020 lists the elements a document must contain to fulfill the deed requirement of RCW 64.04.010. A document must be: (1) in writing; (2) signed by the party to be bound by the transfer of the interest transferred by the deed; and (3) acknowledged by the party to be bound by the transfer before a person authorized by statute to take the acknowledgement of a deed. A standard "Assignment of Deed of Trust" meets each of these three requirements and is therefore a "deed" under Washington law.

Pursuant to RCW 64.08.010, a notary public is authorized to take the acknowledgement of a deed (i.e., an assignment of a DOT). This is one of the primary reasons, long forgotten by many, why all assignments of DOT's are acknowledged, and the acknowledgement is witnessed by a notary public.

The Federal Deposit Insurance Corporation ("FDIC") purportedly assigned the Note and DOT on July 19, 2012 to Deutsche Bank National Trust Company as Trustee for WaMu Mortgage Pass-Through Certificate Series 2005-AR6 ("Trust") ("Assignment"). *Id.*, at 72: 19-21. JPMorgan Chase Bank, NA ("JPM") recorded the Assignment on August 7, 2012. *Id.*, at 21-22.

The Assignment was (1) in writing; (2) signed by JPM, as the alleged attorney-in-fact for the FDIC (*Id.*, at 6: 13-14), the party allegedly

bound thereby; and (3) acknowledged by JPM before a person authorized by statute to take acknowledgements (i.e., a notary republic). *Id.*, at 72: 24-26.

On July 19, 2012, neither JPM, nor JPMorgan Chase & Co., nor the FDIC held or owned any interests in either the Note or DOT. *Id.*, at 73: 1-4. Additionally, on August 7, 2012, the date on which JPM recorded the Assignment, neither JPM, nor JPMorgan Chase & Co., nor the FDIC held or owned any interests in either the Note or DOT. *Id.*

The Trust's "Closing Date" is April 26, 2005. *PSA § 1.01. Id.*, at 7: 8. By federal statute, 26 U.S.C. §860(A) – (G), and the Trust's Pooling and Servicing Agreement ("PSA"), the Trust had to purchase Plaintiff's loan and transfer it into the Trust *no later than July 25, 2005*. *Id.*, at 78: 4-6. The FDIC assigned the Note and DOT on July 19, 2012, almost seven years after July 25, 2005. *Id.* The FDIC did not own or hold any interest in the Note or DOT on July 19, 2012. *Id.*

B. Procedural Facts.

The property that is the subject of this litigation was sold to Plaintiff-Respondent on November 13, 2015. *CP,* at 4: 25. On November 17, 2015, Plaintiff-Respondent ("Plaintiff") served Defendant-Appellant ("Defendant") with a Notice to Vacate. *Id.*, at 5: 3-5. The notice indicated Plaintiff was entitled to possession of the property on December 3, 2015. *Id.* Defendant failed to remove from the property within the time period set out in the notice.

On or about December 8, 2015, Plaintiff commenced an action for unlawful detainer. *Id.,* at 6: 5. On 5 January 2016 a summary proceeding for writ of restitution was conducted in Clark County Superior Court. *Id.,* at 114. Defendant requested a full jury trial on the unlawful detainer action. *Id.,* at 114 and *Id.,* at 180 thru 181. During the proceeding, Defendant denied Plaintiff had *lawfully* purchased Defendant's home as the result of a lawful foreclosure proceeding. *Id.,* at 19: 25 thru 20: 3.

During the proceeding, Defendant offered several reasons why the foreclosure proceeding had not resulted in a lawful sale: (1) the assignment of the property to Plaintiff did not comply with RCW 64.04.010 and RCW 64.04.020 (*Id.,* at 72: 8 thru 73: 4); (2) the appointment of Northwest Trustee Services, Inc. as successor trustee was unlawful (*Id.,* 73: 5-12); (3) the assignment violated RCW 62A.9A-203. (*Id.,* at 76: 10 thru 77: 3); and (4) the assignment violated a federal statute. *Id.,* at 78: 3 thru 79: 9.

The court then granted Plaintiff's motion to show cause, refused to grant Defendant's jury trial request, and issued the writ of restitution. *Id.,* at 114 thru 116. Defendant moved for reconsideration and, in the alternative, a stay of the writ until after the appeal had run its course. *Id.,* at 182 thru 184. The court denied Defendant's request for reconsideration, but granted a stay of the writ on enumerated conditions. *Id.,* at 224. Defendant was unable to meet the $50,000 bond condition[1]

[1] This condition was subsequently reduced to $25,000 by this court. Defendant was still unable to meet the condition.

On January 20, 2016 Defendant appealed. *Id.*, at 225.

On February 5, 2016, the Clark County Sheriff forcibly removed Defendant from the property. *Id.*, at 230.

III ARGUMENT

A. Jury Trial was requested and required.

As indicated in the fact section herein above, in the unlawful detainer proceeding, Plaintiff claimed it purchased Defendant's property lawfully at a foreclosure auction, thereby becoming the lawful owner of the property. Consequently, according to Plaintiff, Plaintiff was entitled to possession of the property.

In her answer to the complaint, Defendant asserted the foreclosure proceeding had not been conducted in accordance with the Washington Deeds of Trust Act ("DTA"); the purchase, accordingly, had not been lawful; Plaintiff was not the lawful owner of the property (Defendant was still the lawful owner); and Plaintiff was not entitled to possession of the property.

The question whether the foreclosure proceeding was conducted in accordance with the requirements of the DTA is a factual question. The DTA requires that the trustee and beneficiary take a series of specific steps, each step at a specific time, to comply with DTA requirements.

By claiming it purchased the property at the sale, and by so doing became the owner of the property, Plaintiff was implicitly claiming the specific steps required by the DTA had been taken (a factual assertion), and those steps had been taken at the specific times established by the DTA (again, a factual assertion). Defendant's answer, for the substantial reasons recited herein below, challenged Plaintiff's implicit factual

assertions.[2] Factual disputes were thereby created by the pleadings in this case.

RCW 59.12.130 provides as follows:

> Whenever an issue of fact is presented by the pleadings it must be tried by a jury, unless such a jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending; and in all cases actions under this chapter shall take precedence of all other civil actions.

Because issues of fact were raised by the pleadings, the court was required by RCW 59.12.130 to grant Defendant's request for a jury trial. Hence, at the conclusion of the unlawful detainer proceeding, regardless of outcome, the court should have set the date for a jury trial. RCW 59.18.380.

Finally, there is a significant constitutional issue at play in this case. The issue was raised in great detail in the unlawful detainer proceeding. That issue, discussed in greater detail immediately below, is factually based. Thus, on this separate basis, the unlawful detainer court should have granted Defendant's demand for a jury trial.

The issue that would have been explored in the trial are discussed in detail below.

B. The Trial Court Erred in refusing to grant a Jury Trial even though a Significant Issue of Constitutional Magnitude and Several Issues of Material Fact Remained Unresolved.

1. *Brown v. Washington Dept. of Commerce,* irreconcilably conflicts with RCW 62A.9A-203 and therefore must yield.

[2] Defendant also challenged some of Plaintiff's legal assertions.

In *Brown v. Dept. of Commerce,* 184 Wn. 2d 509 (2015), the Washington Supreme Court held the *holder* of secured note, regardless of *ownership* of that note, is entitled to enforce the security for the note. That is, the Court upheld a judicially-created version of the common law *security follows the note* doctrine. That doctrine, however, has been codified at RCW 62A.9A-203(a), (b), and (g). *Official Comment 9 to UCC § 9-203.* RCW 62A.9A-203(a), (b), and (g) requires an entity to both own and hold a secured note to be entitled to enforce the deed of trust. Thus, by holding as it did, the Court unwittingly, unintentionally and unconstitutionally amended RCW 62A.9A-203(a), (b), and (g).

Since, under RCW 62A.3-301, the holder of a note need not be the owner of the note to be entitled to enforce it (indeed, a thief, a con man, or an armed robber, if in possession of a blank endorsed note, is entitled to enforce it), the *Brown* decision and RCW 62A.9A-203(a), (b), and (g) are, at least in part, irreconcilably opposed to one another.

This is a matter of constitutional magnitude. The Washington Legislature enacted RCW 62A.9A-203. The provision's constitutionality has never been challenged. Pursuant to Article II, Section 1 of the Washington Constitution, the Washington Legislature has plenary power to enact laws. *Washington State Farm Bureau Federation, v. Gregiore,* 162 Wn.2d 284, 290, 174 P.3d 1142, 2007 Wash. LEXIS 871. Accordingly, when there is an irreconcilable conflict between a constitutionally enacted Washington statute (in this case RCW 62A.9A-203) and a Washington court decision (*Brown*), even a decision of the Washington Supreme Court, the court decision must yield. There is such a conflict between *Brown* and RCW 62A.9A-203(a), (b), and (g). Accordingly, *Brown* must yield.

Moreover, *Brown* is founded on a historically unsustainable version of the *security follows the note* doctrine. RCW 62A.9A-203(g) *is* the codification of that centuries-old common law doctrine. *Official Comment 9 to UCC § 9-203.* The court version of the doctrine (i.e., the holder of a secured note, *regardless of ownership*, is entitled to enforce the security for the note) is diametrically opposed to the statutory version of the doctrine (i.e., *only the owner* of a secured note is entitled to enforce the security for the note). Again, under such circumstances, *Brown* must yield. As a result, this court is not only not bound by *Brown;* it is bound to ignore *Brown.* Plaintiff-Appellant realizes Plaintiff has stated a mouth full. Nevertheless, the statement is accurate.

To have an enforceable ownership interest in the Note attach to the Note, Defendant-Respondent was obligated to meet the three requirements of RCW 62A.9A.-203(b). Defendant had to prove: (1) ***value*** was given for the Note; (2) rights in the note were transferred to Defendant by someone who had rights in the note or who had the right to transfer rights in the note; and (3) Defendant had "***possession***" of the note, as the term "possession" is understood in the UCC,[3] before it commenced this litigation. If Defendant failed to meet any one of these three requirements, then it failed to obtain an enforceable security interest (i.e., "ownership interest") in the Note and, because of RCW 62A.9A.-203(g), simultaneously failed to obtain an enforceable security interest in the DOT. The only one of the three requirements arguably met by Defendants was the *possession* requirement.

[3] Under the UCC, "physical custody" does not necessarily equal "possession." Under RCW 62A.9A.-313, if the person with physical custody of the note acknowledges that he holds the note for the benefit of a third party, the third party has "possession" of the note, not the person who has physical custody of the Note. In the Pooling and Servicing Agreement, which Defendant-Appellant referenced in its Reply to Plaintiff's Motion for Preliminary Injunction, Plaintiff-Respondent repeatedly acknowledges that it holds the Note for the sole benefit of the certificate holders.

2. If an assignment of a note and deed of trust is void ab initio, not voidable, Plaintiff-Appellant may assert the invalidity of the assignment.

a. FDIC assigned Note and DOT.

In *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83 (2012), the Washington Supreme Court ruled that MERS could not be a lawful beneficiary. MERS, the Court reasoned, had never "held" or "owned" the note, and therefore had never had any interest in the note. Since the DOT follows the note (*RCW 62A.9A.-203[a],[b] and [g]*), had no right to assign the beneficial interest in the DOT. One may assign only an interest that one possesses.

While it is true that recordation of an assignment of a deed of trust puts everyone on constructive notice that ownership of the beneficial interest in the DOT has changed hands, the beneficial interest in a deed of trust is transferred by assignment primarily because, as an interest in real property, the beneficial interest in a DOT must be transferred by deed, and a standard assignment of DOT is the preferred form of deed for transferring DOT's in Washington and every other state in the Union.

Assignments of DOT's are such a standard part of the transfer of beneficial interests in DOT's in Washington that many jurists appear to have forgotten the primary reason why assignments are utilized to make such transfers. In the absence of a lawful assignment of the DOT, the beneficial interest in the DOT is never transferred.

In this case, the assignment was unlawful because it was untimely. The FDIC assigned the Note and DOT to the Trust on July 19, 2012. The Trust, however, is a 2005 trust that closed on April 26, 2005. Thereafter, pursuant to the Pooling and Servicing Agreement and federal statute, placement of a loan in the Trust was strictly prohibited.

Every sale, conveyance or other act of a trustee in contravention of the trust's governing documents is void, not voidable. Therefore Deutsche's acceptance of the Note and DOT into the Trust more than seven years after the Trust closed is void. *Glaski v. Bank of America, 218 Cal. App. 4th 1079, 1097 (2013)* (The reasoning of this case—which was in the solitary minority in California at one point--has since been approved by the California Supreme Court in *Yvanova v. New Century Mortgage Corporation*). Consequently, Plaintiff-Appellant's claims should not have been dismissed. *See Glaski,* 218 Cal. App. 4th at 1097-98.

In the trial Defendants claimed a violation of the REMIC statutes is irrelevant to the case because that statute merely determines tax consequences to the Trust. The REMIC statute does much more than that. Placement of a loan in a trust after the closing date places the entire trust's REMIC status at risk. *Id.* Voiding the attempted transfer protects the beneficiaries of the trust by preventing the potential adverse consequence, to each beneficiary, of the entire REMIC losing its tax status as a REMIC. The trust would then be taxed on all revenue that passed through the Trust on its way to the beneficiaries, and the beneficiaries would be taxed on the

same revenue. This double taxation would severely reduce, if not completely eliminate, the beneficiaries' profits. REMIC trusts would quickly cease to exist, and the international market for securitized assets that REMIC's make possible (and the massive United States homeowner financing that the international market produces) would quickly dry up and cease to exist.

By far the most consequential potential danger to this country's financial markets is not the product of allowing borrowers to assert that a late assignment is void. The most consequential potential danger is in *not* allowing borrowers to assert such transfers are void.

Because the transfer was void ab initio, and also because RCW 64.04.010 requires all interests in real property to be lawfully transferred by deed, and the FDIC assignment was not a lawful transfer by deed of the beneficial interest in the DOT, the Trust never obtained an interest in the Note or DOT. As a consequence, the Trust has never had lawful authority to foreclose.

The FDIC did not sell Washington Mutual's assets to JPMorgan until September 25, 2008. Thus, the FDIC had no interest in the Note or DOT to transfer on July 19, 2012, almost 4 years after the FDIC had allegedly transferred any interest it had in Washington Mutual's assets to JPMorgan. The FDIC could not assign interests that it did not possess. *Bain* 175 Wn.2d at ¶ 50. Thus, the beneficial interest in the DOT has never

been transferred to the Trust – a violation of the RCW 64.04.010 requirement that all interest in real property be transferred by deed.

b. NWTS had no lawful authority to commence this foreclosure.

The Trust derived its authority to act from FDIC's assignment of the Note and DOT to the Trust – an assignment that, for several reasons,[4] was legally ineffective. NWTS was appointed the successor trustee by the Trust – an appointment that, because of the ineffectiveness of the FDIC's assignment, was also legally ineffective. Accordingly, NWTS had no authority to proceed with a non-judicial foreclosure and has violated the DTA by starting one. *Walker v. Quality Loan Service Corporation of Washington*, 176 Wn.App. 294 (2013) at ¶ 14.

c. The foreclosure is forbidden by 26 U.S.C. §860(F)(a)(2)(B).

26 U.S.C. §860(F)(a)(2)(B) prohibits any transaction that produces income from an asset that is neither a "qualified mortgage" nor a "permitted investment.

1. Plaintiff's loan is not a "qualified mortgage."

When the FDIC assigned Plaintiff's loan (Note and DOT) into the Trust on July 19, 2012, the loan did not become a "qualified mortgage" for three reasons.

[4] The assignment was legally ineffective because: (1) the FDIC had no interest to assign; (2) even if the FDIC had had an interest to assign, (a) the loan was assigned more than 7 years ***after*** the Trust closed and (b) the FDIC did not receive a regular or residual interest in exchange for the assignment of the loan.

a. FDIC assigned the DOT in violation of RCW 64.04.010.

The assignment was legally invalid because it was made by the FDIC, an entity that did not own any interest in the Note or DOT. As a result, the assignment violated the requirement in RCW 64.04.020 that an interest in real property be transferred by the person to whom the interest transferred is owed. There has never been any other attempt to assign the DOT to the Trust. Accordingly, pursuant to the requirements of RCW Chapter 64.04, the lien interest in the Property represented by the DOT has never been lawfully transferred into the Trust.

b. Loan assigned to Trust more than five years after Trust's Startup Date and therefore was not a "qualified mortgage."

The loan was not assigned to the Trust until more than 7 years after the Trust closed. According to the Trust Agreement, *the Trust closed on April 26, 2005*. The Assignment occurred on *July 19, 2012*, more than 7 years after the Trust closed. Pursuant to 26 U.S.C. §860(G)(a)(3)(A)(i) and (ii), to be a "qualified mortgage" a loan must be assigned into the Trust, at the very latest, *no later than 90 days after the Trust's closing date.* Transfer of a loan into a REMIC trust after the 90th day is prohibited by federal law. *See 26 U.S.C. §860(F) and (G).* Such a transfer puts at risk the tax status of the entire REMIC, including its thousands of monthly loan transactions. Since the loan was not assigned into the Trust until more than 7 years after the Trust's closing date, if it has ever been assigned into

the Trust, the loan is not legally part of the Trust. And the Trust is prohibited by federal statute from conducting any transactions related to Plaintiff's loan.

Moreover, this court has an obligation not to aid anyone in the violation of federal law.

c. FDIC did not receive "Regular" or "Residual" Interests in Exchange for Loan and therefore Loan was not a "Qualified Mortgage."

When the FDIC assigned the loan into the Trust, it did not receive a "regular" or "residual" interest in the Trust in exchange for the loan. Pursuant to 26 U.S.C. §860(G)(a)(3)(A)(i), to be a "qualified mortgage," a loan must be transferred into a Trust in exchange for regular or residual interests in the Trust. Consequently, even if the FDIC did actually transfer the loan into the Trust, the loan would not have become a "qualified mortgage," even if it had been lawfully transferred into the Trust.

2. The loan is not "permitted investment."

Pursuant to 26 U.S.C. §860(G)(a)(5), the term "permitted investment" means a "cash flow investment," a "qualified reserve asset," or a "foreclosure property." The term "Cash flow investment" is defined in 26 U.S.C. §860(G)(a)(6). Plaintiff's loan does not fit the definition and therefore is not a "cash flow investment." A "qualified reserve asset" is defined in 26 U.S.C. §860(G)(a)(7). Plaintiff's loan does not fit the definition and therefore is not a "qualified reserve asset." "Foreclosure

property" is defined in 26 U.S.C. §860(G)(a)(8), by way of incorporation of the definition of "foreclosure property" contained in 26 U.S.C. §856(e). Plaintiff's loan does not fit the definition of "foreclosure property" contained in 26 U.S.C. §856(e). Plaintiff's loan is not "foreclosure property." Accordingly, Plaintiff's loan is not a "permitted investment."

3. Even if Loan was Lawfully in Trust, which It was not, 26 U.S.C. §860(F)(a)(2)(B) would forbid any Transaction Respecting Loan that produced Income to the Trust.

Under 26 U.S.C. §860(F)(a)(2)(B), transactions that result in the receipt of ***any income*** from an asset that is neither a "qualified mortgage" nor a "permitted investment" are strictly forbidden. As demonstrated above, under these circumstances, Plaintiff's loan is neither a "qualified mortgage" nor a "permitted investment." Consequently, the Trust – Even if it lawfully had the Property, which it does not. – would be forbidden to sell the property. As such, NWTS had no lawful right to conduct the sale and violated federal law by doing so.

IV CONCLUSION

Each Defendant's participation in the preparation, execution and implementation of the numerous false documents that have been prepared and executed in this case violated the DTA. Defendants actions have also violated RCW 64.04.010(2), RCW 62A.9A-203(a),(b), and (g) (i.e., the "security follows the note" legal axiom) and 26 U.S.C. §860(A)-(G).

There are clearly issues of material fact that remain to be decided in both Plaintiff Consumer Protection Act case and Defendants' unlawful detainer action.

For all of the reasons recited herein above, this Court should reverse the trial court's ruling on summary judgment and unlawful detainer court's ruling granting the writ of restitution and remand this case to the trial court with instructions to the trial court that the case be reinstated and permitted to continue.

Dated this 18th Day of August 2016.

Respectfully submitted,

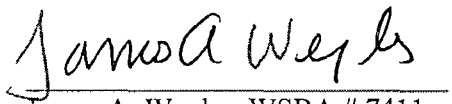

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TABLE OF AUTHORITIES

STATUTES

RCW 59.12.130

Jury—Actions given preference.

Whenever an issue of fact is presented by the pleadings it must be tried by a jury, unless such a jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending; and in all cases actions under this chapter shall take precedence of all other civil actions.

[1891 c 96 § 15; RRS § 824. Prior: 1890 p 79 § 15.]

WASHINGTON STATE LEGISLATURE

RCW 61.24.005

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Affiliate of beneficiary" means any entity which controls, is controlled by, or is under common control with a beneficiary.

(2) "Beneficiary" means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.

(3) "Borrower" means a person or a general partner in a partnership, including a joint venture, that is liable for all or part of the obligations secured by the deed of trust under the instrument or other document that is the principal evidence of such obligations, or the person's successors if they are liable for those obligations under a written agreement with the beneficiary.

(4) "Commercial loan" means a loan that is not made primarily for personal, family, or household purposes.

(5) "Department" means the department of commerce or its designee.

(6) "Fair value" means the value of the property encumbered by a deed of trust that is sold pursuant to a trustee's sale. This value shall be determined by the court or other appropriate adjudicator by reference to the most probable price, as of the date of the trustee's sale, which would be paid in cash or other immediately available funds, after deduction of prior liens and encumbrances with interest to the date of the trustee's sale, for which the property would sell on such date after reasonable exposure in the market under conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under duress.

(7) "Grantor" means a person, or its successors, who executes a deed of trust to encumber the person's interest in property as security for the performance of all or part of the borrower's obligations.

(8) "Guarantor" means any person and its successors who is not a borrower and who guarantees any of the obligations secured by a deed of trust in any written agreement other than the deed of trust.

(9) "Housing counselor" means a housing counselor that has been approved by the United States department of housing and urban development or approved by the Washington state housing finance commission.

(10) "Owner-occupied" means property that is the principal residence of the borrower.

(11) "Person" means any natural person, or legal or governmental entity.

(12) "Record" and "recorded" includes the appropriate registration proceedings, in the instance of registered land.

(13) "Residential real property" means property consisting solely of a single-family residence, a residential condominium unit, or a residential cooperative unit. For the purposes of the application of RCW 61.24.163, owner-occupied residential real property includes residential real property of up to four units.

(14) "Senior beneficiary" means the beneficiary of a deed of trust that has priority over any other deeds of trust encumbering the same residential real property.

(15) "Tenant-occupied property" means property consisting solely of residential real property that is the principal residence of a tenant subject to chapter 59.18 RCW or other building with four or fewer residential units that is the principal residence of a tenant subject to chapter 59.18 RCW.

(16) "Trustee" means the person designated as the trustee in the deed of trust or appointed under RCW 61.24.010(2).

(17) "Trustee's sale" means a nonjudicial sale under a deed of trust undertaken pursuant to this chapter.

[2014 c 164 § 1. Prior: 2011 c 364 § 3; 2011 c 58 § 3; prior: 2009 c 292 § 1; 1998 c 295 § 1.]

NOTES:

Findings—Intent—2011 c 58: "(1) The legislature finds and declares that:

(a) The rate of home foreclosures continues to rise to unprecedented levels, both for prime and subprime loans, and a new wave of foreclosures has occurred due to rising unemployment, job loss, and higher adjustable loan payments;

(b) Prolonged foreclosures contribute to the decline in the state's housing market, loss of property values, and other loss of revenue to the state;

(c) In recent years, the legislature has enacted procedures to help encourage and strengthen the communication between homeowners and lenders and to assist homeowners in navigating through the foreclosure process; however, Washington's nonjudicial foreclosure process does not have a mechanism for homeowners to readily access a neutral third party to assist them in a fair and timely way; and

(d) Several jurisdictions across the nation have foreclosure mediation programs that provide a cost-effective process for the homeowner and lender, with the assistance of a trained mediator, to reach a mutually acceptable resolution that avoids foreclosure.

(2) Therefore, the legislature intends to:

(a) Encourage homeowners to utilize the skills and professional judgment of housing counselors as early as possible in the foreclosure process;

(b) Create a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and avoid foreclosure whenever possible; and

(c) Provide a process for foreclosure mediation when a housing counselor or attorney determines that mediation is appropriate. For mediation to be effective, the parties should attend the mediation (in person, telephonically, through an agent, or otherwise), provide the necessary documentation in a timely manner, willingly share information, actively present, discuss, and explore options to avoid foreclosure, negotiate willingly and cooperatively, maintain a professional and cooperative demeanor, cooperate with the mediator, and keep any agreements made in mediation." [2011 c 58 § 1.]

Short title—2011 c 58: "This act may be known and cited as the foreclosure fairness act." [2011 c 58 § 2.]

WASHINGTON STATE LEGISLATURE

RCW 61.24.010

Trustee, qualifications—Successor trustee.

(1) The trustee of a deed of trust under this chapter shall be:

(a) Any domestic corporation or domestic limited liability corporation incorporated under Title 23B, 25, *30, 31, 32, or 33 RCW of which at least one officer is a Washington resident; or

(b) Any title insurance company authorized to insure title to real property under the laws of this state, or any title insurance agent licensed under chapter 48.17 RCW; or

(c) Any attorney who is an active member of the Washington state bar association at the time the attorney is named trustee; or

(d) Any professional corporation incorporated under chapter 18.100 RCW, any professional limited liability company formed under chapter 25.15 RCW, any general partnership, including limited liability partnerships, formed under chapter 25.04 RCW, all of whose shareholders, members, or partners, respectively, are either licensed attorneys or entities, provided all of the owners of those entities are licensed attorneys, or any domestic corporation wholly owned by any of the entities under this subsection (1)(d); or

(e) Any agency or instrumentality of the United States government; or

(f) Any national bank, savings bank, or savings and loan association chartered under the laws of the United States.

(2) The trustee may resign at its own election or be replaced by the beneficiary. The trustee shall give prompt written notice of its resignation to the beneficiary. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, the beneficiary shall appoint a trustee or a successor trustee. Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.

(3) The trustee or successor trustee shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust.

(4) The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.

[2012 c 185 § 13; 2009 c 292 § 7; 2008 c 153 § 1; 1998 c 295 § 2; 1991 c 72 § 58; 1987 c 352 § 1; 1981 c 161 § 1; 1975 1st ex.s. c 129 § 1; 1965 c 74 § 1.]

NOTES:

***Reviser's note:** Title 30 RCW was recodified and/or repealed pursuant to 2014 c 37, effective January 5, 2015.

WASHINGTON STATE LEGISLATURE

RCW 62A.3-301

Person entitled to enforce instrument.

"Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

[1993 c 229 § 29; 1965 ex.s. c 157 § 3-301. Cf. former RCW 62.01.051; 1955 c 35 § 62.01.051; prior: 1899 c 149 § 51; RRS § 3442.]

NOTES:

Recovery of attorneys' fees—Effective date—1993 c 229: See RCW 62A.11-111 and 62A.11-112.

WASHINGTON STATE LEGISLATURE

RCW 62A.9A-203

Attachment and enforceability of security interest; proceeds; supporting obligations; formal requisites.

(a) **Attachment.** A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) **Enforceability.** Except as otherwise provided in subsections (c) through (i) of this section, a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

(1) Value has been given;

(2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

(3) One of the following conditions is met:

(A) The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;

(B) The collateral is not a certificated security and is in the possession of the secured party under RCW 62A.9A-313 pursuant to the debtor's security agreement;

(C) The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under RCW 62A.8-301 pursuant to the debtor's security agreement; or

(D) The collateral is deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, or electronic documents, and the secured party has control under RCW 62A.7-106, 62A.9A-104, 62A.9A-105, 62A.9A-106, or 62A.9A-107 pursuant to the debtor's security agreement.

(c) **Other UCC provisions.** Subsection (b) of this section is subject to RCW 62A.4-210 on the security interest of a collecting bank, RCW 62A.5-118 on the security interest of a letter-of-credit issuer or nominated person, RCW 62A.9A-110 on a security interest arising under Article 2 or 2A, and RCW 62A.9A-206 on security interests in investment property.

(d) **When person becomes bound by another person's security agreement.** A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this Article or by contract:

(1) The security agreement becomes effective to create a security interest in the person's property; or

(2) The person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

(e) **Effect of new debtor becoming bound.** If a new debtor becomes bound as debtor by a security agreement entered into by another person:

(1) The agreement satisfies subsection (b)(3) of this section with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement; and

(2) Another agreement is not necessary to make a security interest in the property enforceable.

(f) **Proceeds and supporting obligations.** The attachment of a security interest in collateral

gives the secured party the rights to proceeds provided by RCW 62A.9A-315 and is also attachment of a security interest in a supporting obligation for the collateral.

(g) **Lien securing right to payment.** The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

(h) **Security entitlement carried in securities account.** The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(i) **Commodity contracts carried in commodity account.** The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account.

[2012 c 214 § 1503; 2000 c 250 § 9A-203.]

NOTES:

Application—Savings—2012 c 214: See notes following RCW 62A.1-101.

WASHINGTON STATE LEGISLATURE

RCW 62A.9A-313

When possession by or delivery to secured party perfects security interest without filing.

(a) **Perfection by possession or delivery.** Except as otherwise provided in subsection (b) of this section, a secured party may perfect a security interest in tangible negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under RCW 62A.8-301.

(b) **Goods covered by certificate of title.** With respect to goods covered by a certificate of title issued by this state, a secured party may perfect a security interest in the goods by taking possession of the goods only in the circumstances described in RCW 62A.9A-316(d).

(c) **Collateral in possession of person other than debtor.** With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business, when:

(1) The person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party's benefit; or

(2) The person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party's benefit.

(d) **Time of perfection by possession; continuation of perfection.** If perfection of a security interest depends upon possession of the collateral by a secured party, perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession.

(e) **Time of perfection by delivery; continuation of perfection.** A security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under RCW 62A.8-301 and remains perfected by delivery until the debtor obtains possession of the security certificate.

(f) **Acknowledgment not required.** A person in possession of collateral is not required to acknowledge that it holds possession for a secured party's benefit.

(g) **Effectiveness of acknowledgment; no duties or confirmation.** If a person acknowledges that it holds possession for the secured party's benefit:

(1) The acknowledgment is effective under subsection (c) of this section or RCW 62A.8-301(1), even if the acknowledgment violates the rights of a debtor; and

(2) Unless the person otherwise agrees or law other than this Article otherwise provides, the person does not owe any duty to the secured party and is not required to confirm the acknowledgment to another person.

(h) **Secured party's delivery to person other than debtor.** A secured party having possession of collateral does not relinquish possession by delivering the collateral to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

(1) To hold possession of the collateral for the secured party's benefit; or

(2) To redeliver the collateral to the secured party.

(i) **Effect of delivery under subsection (h) of this section; no duties or confirmation.** A secured party does not relinquish possession, even if a delivery under subsection (h) of this section violates the rights of a debtor. A person to which collateral is delivered under subsection (h) of this section does not owe any duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees or law other than this Article otherwise provides.

[2012 c 214 § 1511; (2012 c 214 § 1510 expired July 1, 2013); 2011 c 74 § 710; 2001 c 32 § 26; 2000 c 250 § 9A-313.]

NOTES:

Effective date—2012 c 214 §§ 902, 1403, 1502, 1508, 1511, 1514, 1516, and 1518: See note following RCW 62A.2A-103.

Expiration date—2012 c 214 §§ 901, 1402, 1501, 1507, 1510, 1513, 1515, and 1517: See note following RCW 62A.2A-103.

Application—Savings—2012 c 214: See notes following RCW 62A.1-101.

Application—Effective date—2011 c 74: See notes following RCW 62A.9A-102.

Effective date—2001 c 32: See note following RCW 62A.9A-102.

WASHINGTON STATE LEGISLATURE

RCW 64.04.010

Conveyances and encumbrances to be by deed.

Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed: PROVIDED, That when real estate, or any interest therein, is held in trust, the terms and conditions of which trust are of record, and the instrument creating such trust authorizes the issuance of certificates or written evidence of any interest in said real estate under said trust, and authorizes the transfer of such certificates or evidence of interest by assignment by the holder thereof by a simple writing or by endorsement on the back of such certificate or evidence of interest or delivery thereof to the vendee, such transfer shall be valid, and all such assignments or transfers hereby authorized and heretofore made in accordance with the provisions of this section are hereby declared to be legal and valid.

[1929 c 33 § 1; RRS § 10550. Prior: 1888 p 50 § 1; 1886 p 177 § 1; Code 1881 § 2311; 1877 p 312 § 1; 1873 p 465 § 1; 1863 p 430 § 1; 1860 p 299 § 1; 1854 p 402 § 1.]

WASHINGTON STATE LEGISLATURE

RCW 64.04.020

Requisites of a deed.

Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by *this act to take acknowledgments of deeds.

[1929 c 33 § 2; RRS § 10551. Prior: 1915 c 172 § 1; 1888 p 50 § 2; 1886 p 177 § 2; Code 1881 § 2312; 1854 p 402 § 2.]

NOTES:

***Reviser's note:** The language "this act" appears in 1929 c 33, which is codified in RCW 64.04.010- 64.04.050, 64.08.010- 64.08.070, 64.12.020, and 65.08.030.

WASHINGTON STATE LEGISLATURE

RCW 64.08.010

Who may take acknowledgments.

Acknowledgments of deeds, mortgages and other instruments in writing, required to be acknowledged may be taken in this state before a justice of the supreme court, or the clerk thereof, or the deputy of such clerk, before a judge of the court of appeals, or the clerk thereof, before a judge of the superior court, or qualified court commissioner thereof, or the clerk thereof, or the deputy of such clerk, or a county auditor, or the deputy of such auditor, or a qualified notary public, or a qualified United States commissioner appointed by any district court of the United States for this state, and all said instruments heretofore executed and acknowledged according to the provisions of this section are hereby declared legal and valid.

[1971 c 81 § 131; 1931 c 13 § 1; 1929 c 33 § 3; RRS § 10559. Prior: 1913 c 14 § 1; Code 1881 § 2315; 1879 p 110 § 1; 1877 p 317 § 5; 1875 p 107 § 1; 1873 p 466 § 5.]

26 U.S. Code § 860 - Deduction for deficiency dividends

Current through Pub. L. 114-38 (http://www.gpo.gov/fdsys/pkg/PLAW-114publ38/html/PLAW-114publ38.htm) (See Public Laws for the current Congress (http://thomas.loc.gov/home/LegislativeData.php?n=PublicLaws).)

US Code (/uscode/text/26/860?qt-us_code_temp_noupdates=0#qt-us_code_temp_noupdates)

Notes (/uscode/text/26/860?qt-us_code_temp_noupdates=1#qt-us_code_temp_noupdates)

IRS Rulings (/uscode/text/26/860?qt-us_code_temp_noupdates=2#qt-us_code_temp_noupdates)

prev (/uscode/text/26/859) | next (/uscode/text/26/860A)

(a) GENERAL RULE

If a determination with respect to any qualified investment entity results in any adjustment for any taxable year, a deduction shall be allowed to such entity for the amount of deficiency dividends for purposes of determining the deduction for dividends paid (for purposes of section 852 or 857, whichever applies) for such year.

(b) QUALIFIED INVESTMENT ENTITY DEFINED For purposes of this section, the term "qualified investment entity" means -

(1) a regulated investment company, and

(2) a real estate investment trust.

(c) RULES FOR APPLICATION OF SECTION

(1) INTEREST AND ADDITIONS TO TAX DETERMINED WITH RESPECT TO THE AMOUNT OF DEFICIENCY DIVIDEND DEDUCTION ALLOWED For purposes of determining interest, additions to tax, and additional amounts --

(A) the tax imposed by this chapter (after taking into account the deduction allowed by subsection (a)) on the qualified investment entity for the taxable year with respect to which the determination is made shall be deemed to be increased by an amount equal to the deduction allowed by subsection (a) with respect to such taxable year,

(B) the last date prescribed for payment of such increase in tax shall be deemed to have been the last date prescribed for the payment of tax (determined in the manner provided by section 6601(b)) for the taxable year with respect to which the determination is made, and

(C) such increase in tax shall be deemed to be paid as of the date the claim for the deficiency dividend deduction is filed

(2) CREDIT OR REFUND

If the allowance of a deficiency dividend deduction results in an overpayment of tax for any taxable year, credit or refund with respect to such overpayment shall be made as if on the date of the determination 2 years remained before the expiration of the period of limitations on the filing of claim for refund for the taxable year to which the overpayment relates.

(d) ADJUSTMENT For purposes of this section --

(1) ADJUSTMENT IN THE CASE OF REGULATED INVESTMENT COMPANY In the case of any regulated investment company, the term "adjustment" means --

(A) any increase in the investment company taxable income of the regulated investment company (determined without regard to the deduction for dividends paid (as defined in section 561)),

(B) any increase in the amount of the excess described in section 852(b)(3)(A) (relating to the excess of the net capital gain over the deduction for capital gain dividends paid), and

(C) any decrease in the deduction for dividends paid (as defined in section 561) determined without regard to capital gains dividends.

(2) ADJUSTMENT IN THE CASE OF REAL ESTATE INVESTMENT TRUST In the case of any real estate investment trust, the term "adjustment" means –

(A) any increase in the sum of –

(i) the real estate investment trust taxable income of the real estate investment trust (determined without regard to the deduction for dividends paid (as defined in section 561) and by excluding any net capital gain), and

(ii) the excess of the net income from foreclosure property (as defined in section 857(b)(4)(B)) over the tax on such income imposed by section 857(b)(4)(A).

(B) any increase in the amount of the excess described in section 857(b)(3)(A)(ii) (relating to the excess of the net capital gain over the deduction for capital gains dividends paid), and

(C) any decrease in the deduction for dividends paid (as defined in section 561) determined without regard to capital gains dividends.

(e) DETERMINATION For purposes of this section, the term "determination" means –

(1) a decision by the Tax Court, or a judgment, decree, or other order by any court of competent jurisdiction, which has become final,

(2) a closing agreement made under section 7121,

(3) under regulations prescribed by the Secretary, an agreement signed by the Secretary and by, or on behalf of, the qualified investment entity relating to the liability of such entity for tax; or

(4) a statement by the taxpayer attached to its amendment or supplement to a return of tax for the relevant tax year.

(f) DEFICIENCY DIVIDENDS

(1) DEFINITION
For purposes of this section, the term "deficiency dividends" means a distribution of property made by the qualified investment entity on or after the date of the determination and before filing claim under subsection (g), which would have been includible in the computation of the deduction for dividends paid under section 561 for the taxable year with respect to which the liability for tax resulting from the determination exists if distributed during such taxable year. No distribution of property shall be considered as deficiency dividends for purposes of subsection (a) unless distributed within 90 days after the determination, and unless a claim for a deficiency dividend deduction with respect to such distribution is filed pursuant to subsection (g).

(2) LIMITATIONS

(A) **Ordinary dividends** The amount of deficiency dividends (other than deficiency dividends qualifying as capital gain dividends) paid by a qualified investment entity for the taxable year with respect to which the liability for tax resulting from the determination exists shall not exceed the sum of –

(i) the excess of the amount of increase referred to in subparagraph (A) of paragraph (1) or (2) of subsection (d) (whichever applies) over the amount of any increase in the deduction for dividends paid (computed without regard to capital gain dividends) for such taxable year which results from such determination, and

(ii) the amount of decreased[C1] referred to in subparagraph (C) of paragraph (1) or (2) of subsection (d) (whichever applies).

(B) Capital gain dividends
The amount of deficiency dividends qualifying as capital gain dividends paid by a qualified investment entity for the taxable year with respect to which the liability for tax resulting from the determination exists shall not exceed the amount by which (i) the increase referred to in subparagraph (B) of paragraph (1) or (2) of subsection (d) (whichever applies), exceeds (ii) the amount of any dividends paid during such taxable year which are designated or reported (as the case may be) as capital gain dividends after such determination.

(3) EFFECT ON DIVIDENDS PAID DEDUCTION

(A) For taxable year in which paid
Deficiency dividends paid in any taxable year shall not be included in the amount of dividends paid for such year for purposes of computing the dividends paid deduction for such year

(B) For prior taxable year
Deficiency dividends paid in any taxable year shall not be allowed for purposes of section 855(a) or 858(a) in the computation of the dividends paid deduction for the taxable year preceding the taxable year in which paid.

(g) Claim required
No deficiency dividend deduction shall be allowed under subsection (a) unless (under regulations prescribed by the Secretary) claim therefore is filed within 120 days after the date of the determination.

(h) Suspension of statute of limitations and stay of collection

(1) Suspension of running of statute
If the qualified investment entity files a claim as provided in subsection (g), the running of the statute of limitations provided in section 6501 on the making of assessments, and the bringing of distraint or a proceeding in court for collection, in respect of the deficiency established by a determination under this section, and all interest, additions to tax, additional amounts, or assessable penalties in respect thereof, shall be suspended for a period of 2 years after the date of the determination

(2) Stay of collection In the case of any deficiency established by a determination under this section –

(A) the collection of the deficiency, and all interest, additions to tax, additional amounts, and assessable penalties in respect thereof, shall, except in cases of jeopardy, be stayed until the expiration of 120 days after the date of the determination, and

(B) if claim for a deficiency dividend deduction is filed under subsection (g), the collection of such part of the deficiency as is not reduced by the deduction for deficiency dividends provided in subsection (a) shall be stayed until the date the claim is disallowed (in whole or in part), and if disallowed in part collection shall be made only with respect to the part disallowed

No distraint or proceeding in court shall be begun for the collection of an amount the collection of which is stayed under subparagraph (A) or (B) during the period for which the collection of such amount is stayed.

(i) Deduction denied in case of fraud
No deficiency dividend deduction shall be allowed under subsection (a) if the determination contains a finding that any part of any deficiency attributable to an adjustment with respect to the taxable year is due to fraud with intent to evade tax or to willfull[2] failure to file an income tax return within the time prescribed by law or prescribed by the Secretary in pursuance of law.

(Added Pub. L. 95–600, title III (http://thomas.loc.gov/cgi-bin/bdquery/L?d095:./list/bd/d095pl.lst:600(Public_Laws)), § 362(a), Nov. 6, 1978, 92 Stat. 2848 (http://uscode.house.gov/statviewer.htm?volume=92&page=2848); amended Pub. L. 96–222, title I (http://thomas.loc.gov/cgi-bin/bdquery/L?d096:./list/bd/d096pl.lst:222(Public_Laws)), § 103(a)(11)(B), (C), Apr. 1, 1980, 94 Stat. 213 (http://uscode.house.gov/statviewer.htm?volume=94&page=213); Pub. L. 99–514, title VI (http://thomas.loc.gov/cgi-bin/bdquery/L?d099:./list/bd/d099pl.lst:514(Public_Laws)), § 667(b)(1), Oct. 22, 1986, 100 Stat. 2306 (http://uscode.house.gov/statviewer.htm?volume=100&page=2306); Pub. L. 108–357, title II (http://www.gpo.gov/fdsys/pkg/PLAW-108publ357/html/PLAW-108publ357.htm), § 243(f)(5), Oct. 22, 2004, 118 Stat. 1445 (http://uscode.house.gov/statviewer.htm?volume=118&page=1445); Pub. L. 111–325, title III (http://www.gpo.gov/fdsys/pkg/PLAW-111publ325/html/PLAW-111publ325.htm), § 301(a)(2), title V, § 501(b), Dec. 22, 2010, 124 Stat. 3542 (http://uscode.house.gov/statviewer.htm?volume=124&page=3542), 3554.)

[1] So in original. Probably should be "decrease".

[2] So in original. Probably should be "wilful".

Unif.Commercial Code § 9-203

§ 9-203. Attachment and Enforceability of Security Interest; Proceeds; Supporting Obligations; Formal Requisites.

Currentness [see comment 7 Below]

(a) **[Attachment.]** A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) **[Enforceability.]** Except as otherwise provided in subsections (c) through (i), a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

(1) value has been given;

(2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

(3) one of the following conditions is met:

(A) the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;

(B) the collateral is not a certificated security and is in the possession of the secured party under Section 9-313 pursuant to the debtor's security agreement;

(C) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Section 8-301 pursuant to the debtor's security agreement; or

(D) the collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under Section 9-104, 9-105, 9-106, or 9-107 pursuant to the debtor's security agreement.

(c) **[Other UCC provisions.]** Subsection (b) is subject to Section 4-210 on the security interest of a collecting bank, Section 5-118 on the security interest of a letter-of-credit issuer or nominated person, Section 9-110 on a security interest arising under Article 2 or 2A, and Section 9-206 on security interests in investment property.

(d) **[When person becomes bound by another person's security agreement.]** A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this article or by contract:

(1) the security agreement becomes effective to create a security interest in the person's property; or

(2) the person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

(e) **[Effect of new debtor becoming bound.]** If a new debtor becomes bound as debtor by a security agreement entered into by another person:

(1) the agreement satisfies subsection (b)(3) with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement; and

(2) another agreement is not necessary to make a security interest in the property enforceable.

(f) **[Proceeds and supporting obligations.]** The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by Section 9-315 and is also attachment of a security interest in a supporting obligation for the collateral.

(g) **[Lien securing right to payment.]** The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

(h) **[Security entitlement carried in securities account.]** *The attachment of a security interest in a securities account is also* attachment of a security interest in the security entitlements carried in the securities account.

(i) **[Commodity contracts carried in commodity account.]** The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account.

<Revised Article 9 (2000), Secured Transactions, became effective July 1, 2001>

Editors' Notes

OFFICIAL COMMENT

1. **Source.** Former Sections 9-203, 9-115(2), (6).

2. **Creation, Attachment, and Enforceability.** Subsection (a) states the general rule that a security interest attaches to collateral only when it becomes enforceable against the debtor. Subsection (b) specifies the circumstances under which a security interest becomes enforceable. Subsection (b) states three basic prerequisites to the existence of a security interest:

value (paragraph (1)), rights or power to transfer rights in collateral (paragraph (2)), and agreement plus satisfaction of an evidentiary requirement (paragraph (3)). When all of these elements exist, a security interest becomes enforceable between the parties and attaches under subsection (a). Subsection (c) identifies certain exceptions to the general rule of subsection (b).

* * *

3. **Security Agreement; Authentication.** Under subsection (b)(3), enforceability requires the debtor's security agreement and compliance with an evidentiary requirement in the nature of a Statute of Frauds. Paragraph (3)(A) represents the most basic of the evidentiary alternatives, under which the debtor must authenticate a security agreement that provides a description of the collateral. Under [illegible], a "security agreement" is "an agreement that creates or provides for a security interest." Neither that definition nor the requirement of paragraph (3)(A) rejects the deeply rooted doctrine that a bill of sale, although absolute in form, may be shown in fact to have been given as security. Under this Article, as under prior law, a debtor may show by parol evidence that a transfer purporting to be absolute was in fact for security. Similarly, a self-styled "lease" may serve as a security agreement if the agreement creates a security interest. See [illegible] (distinguishing security interest from lease).

* * *

4. **Possession, Delivery, or Control Pursuant to Security Agreement.** The other alternatives in subsection (b)(3) dispense with the requirement of an authenticated security agreement and provide alternative evidentiary tests. Under paragraph (3)(B), the secured party's possession substitutes for the debtor's authentication under paragraph (3)(A) if the secured party's possession is "pursuant to the debtor's security agreement." That phrase refers to the debtor's agreement to the secured party's possession for the purpose of creating a security interest. The phrase should not be confused with the phrase "debtor has authenticated a security agreement," used in paragraph (3)(A), which contemplates the debtor's authentication of a record. In the unlikely event that possession is obtained without the debtor's agreement, possession would not suffice as a substitute for an authenticated security agreement. However, once the security interest has become enforceable and has attached, it is not impaired by the fact that the secured party's possession is maintained without the agreement of a subsequent debtor (e.g., a transferee). Possession as contemplated by [illegible] is possession for purposes of subsection (b)(3)(B), even though it may not constitute possession "pursuant to the debtor's agreement" and *consequently might not serve as a substitute for an authenticated security agreement under subsection (b)(3)(A).* Subsection (b)(3)(C) provides that delivery of a certificated security to the secured party under [illegible] pursuant to the debtor's security agreement is sufficient as a substitute for an authenticated security agreement. Similarly, under subsection (b)(3)(D), control of investment property, a deposit account, electronic chattel paper, or a letter-of-credit right satisfies the evidentiary test if control is pursuant to the debtor's security agreement.

5. **Collateral Covered by Other Statute or Treaty.** One evidentiary purpose of the formal requisites stated in subsection (b) is to minimize the possibility of future disputes as to the terms of a security agreement (e.g., as to the property that stands as collateral for the obligation secured). One should distinguish the evidentiary functions of the formal requisites of attachment and enforceability (such as the requirement that a security agreement contain a description of the collateral) from the more limited goals of "notice filing" for financing statements under Part 5, explained in [illegible], Comment 2. When perfection is achieved by compliance with the requirements of a statute or treaty described in [illegible], such as a federal recording act or a certificate-of-title statute, the manner of describing the collateral in a registry imposed by the statute or treaty may or may not be adequate for purposes of this section and [illegible]. However, the description contained in the security agreement, not the description in a public registry or on a certificate of title, controls for purposes of this section.

6. **Debtor's Rights; Debtor's Power to Transfer Rights.** Subsection (b)(2) conditions attachment on the debtor's having "rights in the collateral or the power to transfer rights in the collateral to a secured party." A debtor's limited rights in collateral, short of full ownership, are sufficient for a security interest to attach. However, in accordance with basic personal property conveyancing principles, the baseline rule is that a security interest attaches only to whatever rights a debtor may have, broad or limited as those rights may be.

Certain exceptions to the baseline rule enable a debtor to transfer, and a security interest to attach to, greater rights than the debtor has. See Part 3, Subpart 3 (priority rules). The phrase, "or the power to transfer rights in the collateral to a secured party," accommodates those exceptions. In some cases, a debtor may have power to transfer another person's rights only to a class of transferees that excludes secured parties. See, e.g., [illegible] (giving certain merchants power to transfer an entruster's rights to a buyer in ordinary course of business). Under those circumstances, the debtor would not have the power to create a security interest in the other person's rights, and the condition in subsection (b)(2) would not be satisfied.

7. **New Debtors.** Subsection (e) makes clear that the enforceability requirements of subsection (b)(3) are met when a new debtor becomes bound under an original debtor's security agreement. If a new debtor becomes bound as debtor by a security agreement entered into by another person, the security agreement satisfies the requirement of subsection (b)(3) as to the existing and after-acquired property of the new debtor to the extent the property is described in the agreement.

Subsection (d) explains when a new debtor becomes bound. Persons who become bound under paragraph (2) are limited to those who both become primarily liable for the original debtor's obligations and succeed to (or acquire) its assets. Thus, the paragraph excludes sureties and other secondary obligors as well as persons who become obligated through veil piercing and other non-successorship doctrines. In many cases, paragraph (2) will exclude successors to the assets and liabilities of a division of a debtor. See also [illegible], Comment 3.

8. **Supporting Obligations.** Under subsection (f), a security interest in a "supporting obligation" (defined in [illegible]) automatically follows from a security interest in the underlying, supported collateral. This result was implicit under former Article 9. Implicit in subsection (f) is the principle that the secured party's interest in a supporting obligation extends to the supporting obligation only to the extent that it supports the collateral in which the secured party has a security interest. Complex issues may arise, however, if a supporting obligation supports many separate obligations of a particular account debtor and if the supported obligations are separately assigned as security to several secured parties. The problems may be exacerbated if a supporting obligation is limited to an aggregate amount that is less than the aggregate amount of the obligations it supports. This Article does not contain provisions dealing with competing claims to a limited supporting obligation. As under former Article 9, the law of suretyship and the agreements of the parties will control.

9. **Collateral Follows Right to Payment or Performance.** Subsection (g) codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien. See Restatement (3d), Property (Mortgages) § 5.4(a) (1997). See also [illegible] (analogous rule for perfection).

10. **Investment Property.** Subsections (h) and (i) make clear that attachment of a security interest in a securities account or commodity account is also attachment in security entitlements or commodity contracts carried in the accounts.

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Notes of Decisions (3 pp.)

CERTIFICATE OF SERVICE

Case No. 48432-3-II

I the undersigned declare the following:

I am over the age of 18 years and am not a party to this action. On August 18, 2016, I caused to be served a copy of Appellant's Opening Brief (Riverstone Holdings, LLC v. Lopez, Case No. 48432-3)- and this Certificate of Service by email as agreed by counsel on Respondents' counsel listed below and filed with the Clerk, Court of Appeals, Division II with Judge's Working copy. On August 03, 2016 this Court issued a Ruling authorizing filing of Appellant Lopez's Opening Brief before the close of business on 18 August 2016.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of August 2016.

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